INDEX

Opinions Below 1
Jurisdiction 2
Questions Presented 3
Statement of the Case 3
Reasons for Denying the Petition 5
Conclusion 12
Certificate of Service 12

Table of Authorities

CASES:

Bon Air Hotel, Inc. v. *Time, Inc.*, 295 F. Supp. 704 (S.D. Ga. 1969) 8

Curtis Publishing Co. v. *Butts & Associated Press* v. *Walker*, 388 U.S. 130 (1967) 6

First Nat. Bank v. *Cities Service Co.*, 391 U.S. 253 (1967) 11

Garrison v. *Louisiana*, 379 U.S. 64 (1964) 7

Hurley v. *Northwest Publications*, 273 F. Supp. 967 (D. Minn. 1967), aff'd, 398 F. 2d 346 (8th Cir. 1968) 8

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 5, 6, 7, 8, 10

Rosenblatt v. *Baer*, 383 U.S. 75 (1966) 7

Rosenbloom v. *Metromedia*, 415 F. 2d 892 (3d Cir. 1969), cert. granted, 38 U.S.L.W. 3309 (U.S. Feb. 24, 1970) 8

Sartor v. *Arkansas Nat. Gas Corp.*, 321 U.S. 620 (1944) 10

Sellers v. *Time, Inc.*, 299 F. Supp. 582 (E.D. Pa. 1969) 8

Time, Inc. v. *Hill*, 385 U.S. 374 (1967) 7

Time, Inc. v. *McLaney*, 406 F. 2d 565 (5th Cir.), cert. denied, 395 U.S. 922 (1969) 7,8

United Medical Laboratories, Inc. v. *Columbia Broadcasting System, Inc.*, 404 F. 2d 706 (9th Cir. 1968), cert. denied, 394 U.S. 921 (1969) 7,8

United States v. *Diebold*, 369 U.S. 654 (1962) 11

STATUTES:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1292(b) 2,3

FED. R. CIV. P. 56 10

F.S.A. § 836.04 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1490, Misc.

TIME, INC.,
Petitioner,

vs.

MARY ALICE FIRESTONE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The order of the United States Court of Appeals for the Fifth Circuit is as *Time, Inc., a New York Corp.*, v. *Mary Alice Firestone*, Misc. 1566, 5th Cir., March 24, 1970 (on rehearing), and is printed in Petitioner's Appendix, p. C 1.

The order of the United States Court of Appeals for the Fifth Circuit is as *Time, Inc., etc.*, v. *Mary Alice Firestone*, Misc. No. 1566, 5th Cir., January 29, 1970, and is printed in Petitioner's Appendix, p. B 1.

The order and memorandum opinion of the United States District Court is as *Mary Alice Firestone* v. *Time, Inc.*, No. 66-907-CIV-EC, S.D. Fla., December 2, 1969, and is printed in Petitioner's Appendix, pp. A 1-A 4.

JURISDICTION

The order of the Court of Appeals denying petitioner's leave to appeal was entered January 29, 1970, and the order denying petitioner's application for rehearing was entered March 24, 1970.

The jurisdiction sought to be invoked is 28 U.S.C. § 1254(1). Respondent submits that there is no jurisdiction to review the order below since the petition does not present an appropriate question for review by writ of certiorari from this Court.

The questions presented by this petition were adequately reviewed by the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1292(b) and denied. Therefore, further review by this court is unwarranted.

In support of the respondent's opposition to granting jurisdiction under 28 U.S.C. § 1254(1), see also the footnote to petitioner's statement of jurisdiction, p. 2. Therein the petitioner implicitly admits the impropriety of bringing a petition under 28 U.S.C. § 1254(1).

BLEED THROUGH POOR COPY

QUESTIONS PRESENTED

1. Did the District Court err in denying summary judgment in the respondent's action for libel when it had been proven to the satisfaction of that Court, that there were material issues of fact which could only be resolved by a trial?

2. Did the Court of Appeals err in refusing to grant petitioner's leave to appeal from the District Court's denial of summary judgment, following the District Court's certification of the appeal pursuant to 28 U.S.C. § 1292(b)?

3. Did the Court of Appeals err in refusing to grant the petition for rehearing to consider an appeal from the District Court's denial of summary judgment?

STATEMENT OF THE CASE

In the May 20, 1966, issue of Life Magazine the petitioner published an article entitled "Snooping Electronic Invasion of Privacy". That article contained a photograph of the respondent and her former husband with an accompanying caption which read:

> "TWO-WAY SNOOP. In Florida, where electronic eavesdropping is frequently employed in divorce suits, private eyes like Jack Harwood of Palm Beach, shown above with some of his gear, do a thriving business. Harwood, who boasts, 'I'm a fantastic wireman', was hired by tire heir Russell Firestone to keep tabs on his estranged wife Mary Alice. She in turn got one of Harwood's assistants to sell out and work for her and, says Harwood, 'He plays just as rough with the bugs as I do.' A court recently ordered Russell and Mary Alice (right) to stop spying on each other."

The respondent, with the knowledge that the comments referring to her conduct were false, submitted a demand for retraction on May 20, 1966. The petitioner made its refusal of retraction official on June 17, 1966.

The basis for the respondent's complaint was set forth in her amended complaint filed November 19, 1966. The pertinent allegations in Count I of the respondent's complaint were that:

1. That the article in its reference to the respondent was false and malicious.

2. That the photograph of one Jack Harwood defamed the respondent.

3. That said article was published throughout Florida and read by Florida readers.

4. That the respondent had enjoyed an unblemished reputation for veracity, uprightness of character and honesty in all other matters.

5. That as a direct and proximate result of the article, particularly the language: "she in turn got one of Harwood's assistants to sell out and work for her . . .", the respondent was damaged in her personal relations and in her reputation in the community.

Count II of the respondent's complaint realleged every paragraph of Count I, and further alleged that the petitioner had maliciously invaded the private affairs and activities of the respondent without privilege or consent to make such prejudicial, false and misleading accusations. The respondent also alleged that the aforementioned words were intended and understood as meaning that the respondent would bribe, entice, and procure false information or paid testimony in violation of Florida Statute 836.04, *Inciting to Commit Perjury*.

The petitioner moved for summary judgment in the District Court and that motion was denied on December 2, 1969, as printed in Petitioner's Appendix, pp. A 1-A 4. Subsequently, petitioner applied to the United States Court of Appeals for the Fifth Circuit for leave to appeal. By

order dated January 29, 1970, the Fifth Circuit Court of Appeals denied that petition, as printed in Petitioner's Appendix, p. B 1. On February 10, 1970, a petition for rehearing was filed in the Court of Appeals. On March 24, 1970, that petition for rehearing was denied, as printed in Petitioner's Appendix, p. C 1.

REASONS FOR DENYING THE PETITION

I

In trying to establish the propriety of interlocutory review by this Court, the petitioner has grounded his argument on two related propositions. First, that the First Amendment insulates from civil liability any publication dealing with a matter of legitimate public interest, absent a showing that the publication was made with knowledge of its falsity or with serious doubts as to its truth (Petition, p. 8). The second proposition is that, accepting the first proposition as a true statement of the law, then summary judgment is mandated by the First Amendment (Petition, p. 8). These assertions must fail because the petitioner's statement of the law does not coincide with this Court's present rule on civil liability. Furthermore, even if their first proposition were an accurate statement, this case is not a proper one for disposition by summary judgment.

II

Prior to this Court's decision in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), actions in libel sounded in the common law or by statute. With the advent of *New York Times* (p. 279), these common law and statutory doctrines were found to be incapable of meeting the constitutional guarantees called for by the First and Fourteenth Amendments, when the libelled party was a "public offi-

cial". In response to the need for greater freedom of comment in discussing "public officials", this Court formulated a less stringent rule of libel. Quoting from the Court:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. . . ." *New York Times Co.* v. *Sullivan*, supra, 376 U.S., at 279-280.

After this Court had announced its decision in *New York Times* (p. 279), the question arose as to the latitude to be afforded the language "public officials". That inquiry was answered in the decision *Curtis Publishing Co.* v. *Butts & Associated Press* v. *Walker*, 388 U.S. 130 (1967). By its decision in *Butts & Walker* (p. 154), this Court interpreted the *New York Times* principle as having application to persons who are labeled as "public figures" under ordinary tort rules. In finding that both Butts and Walker were "public figures" within the rule, this Court commented:

> "Butts may have attained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy, but both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements. . . .". *Butts* and *Walker*, supra, 388 U.S. at 155.

Butts and *Walker* represent the last significant pronouncement on the *New York Times* rule. Following the rationale of *Butts* and *Walker*, supra, the current state of the law makes those individuals who, by occupation or in-

clination, place themselves in the public sphere, a legitimate topic of public interest and subject to the *New York Times* rule.

In discussing the District Court's denial of summary judgment (Petition, p. 19), the petitioner seems bewildered that the Court did not explain why it felt the respondent was not a "public figure". No explanation was necessary, for it is readily apparent that the respondent had not, either by occupation or inclination made herself the proper subject for discussion in the petitioner's article. Consequently, the respondent's cause of action resides in common law libel and not pursuant to the *New York Times* rule and the District Court's denial of summary judgment was a correct holding.

III

The petitioner would have this Court disregard the existing statement of the law in favor of a so-called "public interest" standard. The key to the petitioner's reasoning in offering a "public interest" test as a substitute for the existing "public figure" test is that the true purpose of the *New York Times* rule is to insulate the subject matter being commented on and not the person.

In support of its argument, the petitioner asserts that this Court has implicitly acknowledged that the "public interest" test is now being applied and that such application is in keeping with the spirit of the *New York Times* rule.* Notwithstanding the petitioner's assertions, this Court has not yet adopted the so-called "public interest" standard as a

*See, New York Times v. Sullivan, 376 U.S. 254 (1964); Garrison v. Louisiana, 379 U.S. 64 (1964); Rosenblatt v. Baer, 383 U.S. 75 (1966); Time, Inc. v. Hill, 385 U.S. 374 (1967); United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., 404 F. 2d 706 (9th Cir. 1968), cert. denied, 394 U.S. 921 (1969); Time, Inc. v. McLaney, 406 F. 2d 565 (5th Cir.), cert. denied, 395 U.S. 922 (1969).

true statement of the *New York Times* rule. Moreover, the cases in the lower Courts, which the petitioner cites as standing for the implementation of a "public interest" standard are not that positive in their actual result.** The respondent will concede that there is language in those cases which seems to establish a "public interest" standard, but careful analysis of those cases reveals that in each instance the defamed party had made himself a "public figure". Therefore, the question remains open as to what those Courts would do in a case such as this one, where there is no "public figure".

The petitioner's proposition is not the law now and the respondent sincerely hopes that it will never become the law. The respondent premises its opposition to such a proposal on the basis that the logical effect of a "public interest" standard would make any such matter which is sufficiently publicized an item of public interest and thereby subject to the *New York Times* rule. Individual citizens who had not chosen the path of notoriety would be greatly hindered in bringing suit under the *New York Times* rule. Moreover, this would not be a volitional choice, it would be an imposition based solely on chance or what some organization with a means of publication deemed to be a matter of "public interest". This is a harsh and unnecessary result, a result this Court need not reach to insure that freedom of process remain inviolate.

IV

The petitioner in challenging the District Court's ruling on the summary judgment, attacked that Court's refusal

---

**_See_, United Medical Laboratories, supra; Rosenbloom v. Metromedia, 415 F. 2d 892 (3d Cir. 1969), cert. granted, 38 U.S. L.W. 3309 (U.S. Feb. 24, 1970); McLaney, supra; Bon Air Hotel, Inc. v. Time, Inc., 295 F. Supp. 704 (S.D. Ga. 1969); Sellers v. Time, Inc., 299 F. Supp. 582 (E.D. Pa. 1969); Hurley v. Northwest Publications, 273 F. Supp. 967 (D. Minn. 1967), aff'd, 398 F. 2d 346 (8th Cir. 1968).

BLEED THROUGH POOR COPY

to allow unrestricted comment on the respondent's alleged use of electronic snooping devices as being untenable (Petition, p. 13), where the Court had admitted that general discussion was acceptable. Again, in the course of its argument, the petitioner referred to the District Court's statement as being a concession to the validity of the "public interest" test (Petition, p. 19). The petitioner's understanding of the import of the District Court's statement is erroneous. By its language, the District Court is not acceding to the petitioner's position. It is only making the valid observation that there is a constitutionally guaranteed right to fair comment on topics of "public interest"; however, in referring to those topics, the publisher must refrain from violating the laws of libel.

The discussion in the petitioner's article concerned the private use of wire tapping, particularly in this instance as it relates to the alleged use in marital relations. The petitioner seems to be annoyed by what it calls the unsatisfactory quality of abstractions (Petition, p. 13) in discussing the subject of private eavesdropping. The respondent would reply that petitioner must be content with the use of abstractions while it continues to libel named parties involved in its reporting or in the alternative must be prepared to exercise legal restraint. This requirement is absolute, because any lesser degree of control would permit the undermining of an institution which is as old and as fundamental as modern civilization itself. Marriage is the institution being dealt with here, and that institution and the preservation of its sanctity and privacy is far more vital and far more essential than being exemplary in discussing a given subject, even if it is a matter of "public interest".

V

The petitioner is attempting to achieve dismissal of this suit by the entry of summary judgment. To be granted such review, it must satisfy certain procedural requirements established by this Court. These requirements must be met within the context of common law libel, since it has been shown in the course of this argument that this is the proper standard of civil liability here. Moreover, although common law libel is the proper law of the case, it should be noted that the petitioner has failed to establish sufficient grounds for dismissal by summary judgment even by the *New York Times* rule.

This Court announced the requirements for dismissal by summary judgment brought under FED. R. CIV. P. 56, when it stated:

> "The Court of Appeals below heretofore has correctly noted that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try . . . ."

Sartor v. *Arkansas Nat. Gas Corp.*, 321 U.S. 620 (1944) at 627. Again, quoting from the Court:

> "It is true that the issue of material fact required by Rule 56(e) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather all that is required is sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial . . . ."

First Nat. Bank v. *Cities Service Co.*, 391 U.S. 253 (1967) at 288-289. Finally, on a petition for summary judgment the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion, *United States* v. *Diebold*, 369 U.S. 654 (1962).

The respondent submits that the District Court's order (Petitioner's Appendix, pp. A 1-A 4) denying the petitioner's motion for summary judgment was a harmonious application of the law on summary judgments set forth in the cases above. Reference to the record now before this Court will verify the respondent's confidence in the opinion of the District Court.

VI

Throughout its argument the petitioner has expressed fear of the chilling effect libel suits have on a free press. It is convinced that the possible expense in defending these suits is enough in itself to deter fair comment. The respondent would only ask this Court to carefully weigh that argument against the rights of individual citizens who have not chosen to become "public figures" to pursue their legal remedies without the undue burden of proving malice. When these two conflicting positions are considered, the respondent feels confident that this Court will reject the petitioner's proposed revision of the *New York Times* rule.

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review an order of that Court should be denied.

Respectfully submitted,

JOSEPH DENSON FARISH, JR.
Attorney for Respondent

Of Counsel:

FARISH & FARISH
Denco Building
316 First Street
West Palm Beach, Florida 33402

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief in Opposition was mailed this 12th day of May, 1970, to Messrs. Frates, Fay, Floyd & Pearson, Twelfth Floor, Concord Building, Miami, Florida 33130, Attention: Messrs. William S. Frates and Larry S. Stewart, and Messrs. Cravath, Swaine & Moore, One Chase Manhattan Plaza, New York, New York 10005, Attention: Messrs. Harold R. Medina, Jr., and W. Dennis Cross, Attorneys for Petitioner.

JOSEPH DENSON FARISH, JR.
Attorney